No. 78-1545 and 80-951 (Consolidated)

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

No. 78-1545

ANNE B. ZIPES, et al., Petitioners,

v.

TRANS WORLD AIRLINES, INC., Respondent,

No. 80-951

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS, Petitioner,

v.

TRANS WORLD AIRLINES, INC., and ANNE B. ZIPES, et al., Respondents.

On Writs of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONSE OF PLAINTIFF CLASS TO UNION'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF IN NO. 80-951

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We do not agree that the en banc decision of the Fifth Circuit in United States v. City of Miami, Florida is relevant to "one of the questions presented by petitioner in this case, whether a consent decree may be entered over the objection of a union whose contract rights are adversely affected thereby" (Motion for Leave to File, at p. 1).

We stressed in our opening Brief (at pp. 19-24) that the grant of retroactive competitive seniority in this case was not part of the settlement agreement between TWA and the plaintiff class. The district court entered its seniority order only after an evidentiary hearing in which the union had ample opportunity to litigate its objections to the relief sought by plaintiffs (II J.A. 26-190).

There is in this case no consent decree to which the union objects. There is only a litigated judgment granting retroactive seniority and the union can hardly complain that its protests were heard only when the case reached the remedy stage. As we pointed out at oral argument, the union itself chose to stay out of the case until that stage. Thus, the union told the district court in 1979, two years after it came into existence:*/

> In this case, the Union certainly had no reason to intervene prior to this time. The Union was not in existence for the first seven years of this litigation. Shortly after the Union came into existence, counsel for the Union spoke with counsel for defendant [TWA] regarding this litigation; and it was mutually agreed that no purpose would be served by the Union intervening at that time, but that intervention by the Union might be appropriate if and when the case ever reached the remedy stage.

The union itself thus must acknowledge that it cannot legitimately claim any lack of opportunity to litigate the propriety of the seniority remedy in this case. This is doubtless why the union framed the questions presented in No. 80-951 as whether the district court properly ordered retroactive seniority in the absence of subject matter jurisdiction (question 1) and in the absence of a finding of a violation of

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*/ Supplemental Suggestions of Intervenor IFFA In Support of Motions to Intervene and for Extension of Time, at p. 4 (copies were distributed to the Court at oral argument). In the history of this litigation, the incumbents have had three collective bargaining representatives and participation in the case by those unions has hardly been lacking. The first union (Local 550) filed the complaint in 1970 (I J.A. 4a). Although the court of appeals later ruled that Local 550 could not represent the class (I J.A. 64a), that union remained in the case as a party until, six years later in 1976, it became defunct and a new union (Local 551) was given leave to intervene (III Supp. App. XV, 113).

The present union--IFFA--came into existence in April 1977 but for two years it deliberately chose to stay out of the case, as the quotation in the text reveals.

Title VII (question 2). See Certiorari Petition, No. 80-951, at p. i.*/ The City of Miami decision has no bearing on those issues. None of the opinions deal with the interpretation of former Section 706(d). The mandate of the court of appeals, which is set forth in Judge Rubin's opinion, granted the union in that case the opportunity to contend on remand that discrimination had not occurred or that the particular relief agreed upon by the other parties was not appropriate (Slip op., at p. 13733). In this case, the present union chose not to participate until the remedy stage and it had the opportunity to prove that retroactive seniority was inappropriate despite the command of Franks v. Bowman Transportation Co., 424 U.S. 747, 777 (1976), that such relief is "presumptively necessary."**/

Although City of Miami is thus inapposite, we have no objection to the Court's granting of the union's motion. The only effect of the union's supplemental brief is to bring the case to the Court's attention and that has already been accomplished.

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*/ As we have pointed out (Brief, at p. 22) and as the Solicitor General has noted (Brief Amici Curiae, at p. 24 n. 26), in view of the district court's finding that TWA's "no-motherhood" policy violated Title VII with respect to all members of the plaintiff class, the union's second question presented rests on an invalid factual assumption. The first question presented depends upon whether the 90-day requirement in former Section 706(d) is jurisdictional.

**/ Although the propriety of the particular seniority award is not at issue here in view of this Court's order dismissing the writ in No. 80-951 as improvidently granted except with respect to questions 1 and 2 in the union's petition (II J.A. 213), we note--as did the Solicitor General (Brief Amici Curiae, at p. 29 n. 32)--that the former employees received only the seniority they would have had but for TWA's illegal policy.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of January, 1982, counsel for the union and TWA were served by mailing a copy of the foregoing Response first-class, postage prepaid.

A. Raymond Randolph, Jr.